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No. 99-129 Original

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

Motion of the Audubon Naturalist Society for Leave to File an Amicus Curiae Brief Opposing the Commonwealth of Virginia's Motion for Leave to File a Bill of Complaint and Amicus Curiae Brief of the Audubon Naturalist Society

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INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully moves the Court to grant it leave to file this *amicus curiae* brief opposing the Commonwealth of Virginia's motion for leave to file a bill of complaint.[1] Established in 1897, ANS is the oldest naturalist organization in the Washington metropolitan area, with more than 10,000 members from Virginia, Maryland and Washington, D.C. ANS and its members have a considerable stake in this controversy because they use the very portion of the river where the Fairfax County Water Authority (the "Authority") proposes to build a mid-river intake.

In addition, ANS' Virginia members oppose the Commonwealth's claim that it represents them as *parens patriae*. To demonstrate this point, ANS has attached affidavits from two of its many members who oppose the Authority's proposed intake on environmental grounds and who object to the Commonwealth's claim to represent their interests as *parens patriae*. (Affidavit of Dr. John De Noyer (App. C); Affidavit of Marrie Ridder (App. D).) Dr. De Noyer is among the country's most respected geophysicists, with nearly 50 years of experience, and has served as the Chairman of the Fairfax County Environmental Quality Advisory Council. He also is a customer of the Authority and, as an elected member of the Herndon Town Council, represents an entire community that drinks the Authority's water. (App. C.) Affiant Marrie Ridder has been appointed Chairman of the Virginia Council on the Environment by two Virginia Governors and is a riparian

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The State of Maryland has consented to the filing of this brief, (Letter from Baida to Man of 5/23/00 (App. A)), but the Commonwealth of Virginia has refused to give its consent. (Letter from Fisher to Man of 5/28/00 (App. B).)

land owner on the Virginia side of the Potomac River. (App. D.)

ANS and its members have a long history of using this segment of the Potomac River. For well over 40 years, ANS has organized bird watching and guided nature tours near the location of the proposed intake. ANS also conducts kayaking and canoe trips along this portion of the Potomac. For example, a kayaking trip has been scheduled for this Fall that actually would traverse the area where the proposed intake would be built. Periodically, ANS also offers nature photography courses and graduate environmental courses for Virginia's teachers.

ANS depends on those activities to attract new members and promote member participation. These activities also provide a forum in which ANS can teach its members and the public about the importance of conservation. ANS has found that the natural environment provides the best classroom for teaching environmental values.

The Authority's proposed construction of the intake threatens the activities that ANS and its members enjoy and depend upon. The Authority's proposal involves blasting a trench that is 18 feet deep, 18 feet wide, and that would extend 725 feet into the center of the river. A hole also would need to be blasted in the center of the riverbed that would be large enough to accommodate an intake structure 35 feet wide. The construction would last several months, and there can be little question that blasting and the operation of heavy machinery would injure the aesthetic and recreational attributes that the area now provides ANS and its members. Among other detriments, kayaking and canoeing on the river would be severely limited if not rendered impossible by the serious danger posed by blasting and the related construction.

Aside from the short-term impacts from construction, ANS and its members are concerned that the construction and

operation of the intake will have serious long-term consequences. Blasting and construction would generate a great deal of sediment, which may have irreversible effects on the ecology. Once built, the intake may cause erosion of the riverbed, which could disturb the ecology by altering the flow and course of the river. Suction from the intake also may threaten the ecology through the entrapment and entrainment of aquatic life.

In opposing ANS' submission of its views as *amicus curaie*, the Commonwealth mistakenly suggests that any interest ANS has in this litigation "can be adequately represented by the State of Maryland." (App. B.) This contention lacks merit for two reasons. First, ANS has much narrower interests to protect in this case than the State of Maryland. To be sure, environmental preservation is an important goal that ANS shares with the State of Maryland, but the State, unlike ANS, represents countless other interests that it must balance against the goal of environmental preservation in making its decisions. This distinction alone would justify ANS' intervention in its own right,[2] and is more than adequate to justify ANS' submission of its own views as an *amicus curaie*.

Second, the State of Maryland cannot vindicate the interests of ANS' Virginia members when the Commonwealth alleges that it is acting as a class representative for those

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[2] *See, e.g., Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of Interior*, 100 F.3d 837, 844-45 (10th Cir. 1996); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303-04 (8th Cir. 1996); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994); *In re Sierra Club*, 945 F.2d 776, 779-80 (4th Cir. 1991); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The burden of making this showing for intervention is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (noting that "it is not unusual to permit intervention of private parties in original actions").

persons. If the Commonwealth is permitted to act as a representative for ANS' Virginia members as *parens patriae*, those persons could be bound by representations made by the Commonwealth in this litigation.[3] These members may be involved in future litigation against the Commonwealth or the Authority concerning this proposed intake and should not be bound by the representations of an adverse party. The Commonwealth's argument does not demonstrate that Maryland adequately represents ANS' interests, but conclusively demonstrates that the Commonwealth is an inappropriate representative of ANS' Virginia members in a *parens patriae* capacity.

STATEMENT OF THE CASE

Due to the rapid and largely unchecked development of Northern Virginia, considerable urban runoff empties into Sugarland and Broad Runs and then flows into the Potomac River. The adverse impact of this sedimentation on the Potomac River and its users is considerable; however, the Commonwealth's complaint focuses only upon the impact to the Authority. The Authority is concerned that its shoreline intake withdraws these waters and the associated sediment and it must filter out and dispose of the sediment at great expense. Assuming that Virginia's sedimentation problem will not improve, the Authority seeks to move its intake away

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[3] *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) "[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.' " (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F 3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

from the Virginia shoreline. The Authority does not seek an increase in its appropriation of water.

For more than twenty years, the Commonwealth has ignored its legal obligation to control sedimentation. Since 1977, it has been "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner. . . ." 33 U.S.C. § 1251(a)(7) (1994). This Court has explained that this policy reflects Congress' belief that "'it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bay View Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting S. Rep. No. 92-414, at 77 (1972)).

The Clean Water Act places the burden of preventing nonpoint source pollution, including urban runoff, on the states in the first instance. The Commonwealth is required to identify areas where nonpoint source pollution, including "construction related sources of pollution," are present and "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(H). Congress made grants available to the states to assist them in this endeavor, *id.* at § 1288(f), and provided technical assistance from federal agencies. *Id.* at § 1288(h),(i). In addition, "Section 1329, added to the Act in 1987, requires States to adopt nonpoint source management programs and similarly provides for grants to encourage reduction in nonpoint source pollution." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

States are required to establish water quality standards that are designed, *inter alia*, to protect the water body's "use and value for public water supplies," 33 U.S.C. § 1313(c)(2)(A), and, where those standards are not met, states are required to set a total maximum daily load ("TMDL") for pollutants, including sediment, that would allow those standards to be achieved. 33 U.S.C. § 1313(d)(2). If EPA rejects the state's designation of an area where a TMDL is needed or the

proposed TMDL for that area, EPA is required to make those determinations. 33 U.S.C. § 1313(d)(2).

Once an area is designated and a TMDL is set, the Commonwealth must then devise and implement a plan that will bring the water body into compliance with the TMDL. 33 U.S.C. § 1313(e). EPA's anti-degradation policy prevents back-sliding after the standards are met by requiring, *inter alia*, that the Commonwealth use "all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 131.12(a)(2); *see also* 33 U.S.C. § 1313(d)(4)(B).

TMDL's are highly effective in restoring water quality. "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impaired by non-point source pollution." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994); *see American Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1002 (D.C. Cir. 1997) (endorsing TMDL for the Great Lakes).

Although the Commonwealth concedes that nonpoint source pollution into Sugarland and Broad Runs compromises the Potomac's "use and value for public water supplies." 33 U.S.C. § 1313(c)(2)(A), it has not implemented the required controls. The Commonwealth's Bill of Complaint makes this concession explicit: "[t]he Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms. . . . These conditions significantly interfere with the smooth operation of the water treatment plant. . . ." (Bill of Compl. at 10, ¶ 21.)

The Commonwealth's failure to comply with the Clean Water Act is a pervasive problem. Although "Virginia was to have submitted initial TMDLs to EPA by June 26, 1979, and thereafter from 'time to time,' " *American Canoe Ass'n v. EPA*, 54 F. Supp.2d 621, 623 (E.D. Va. 1999), the

Commonwealth never has taken this obligation seriously. As one court recently discovered, "[i]n the nearly twenty years that have elapsed since the initial 1979 deadline, Virginia either has submitted no TMDLs or has submitted a single TMDL for one small tributary in the state, and EPA has never established any TMDL for any of Virginia's waters." *Id.* at 624.

After twenty years of noncompliance by the Commonwealth, environmental organizations sued EPA to set TMDLs for Virginia. *Id.* at 622. The District Court approved a consent decree that establishes a time-table for the Commonwealth to submit TMDLs and that compels EPA to issue TMDLs if the Commonwealth misses those deadlines. *Id.* at 629. As a result of the consent decree and the Commonwealth's acknowledgment of sedimentation problems in Sugarland and Broad Run, the Commonwealth is obligated to implement a program to control the sedimentation.

Despite the existence of the consent decree, the Authority evidently questions the Commonwealth's intention of honoring its obligations under the Clean Water Act. In assessing its future water needs, the Authority's model assumes that the sedimentation levels affecting the current shoreline intake will remain constant over the next 40 years. (Draft Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake (Dec. 1996) (App. E).) Consequently, the Authority proposes to spend $5.3 million on a new intake in the middle of the river to avoid the sediment contamination along the Virginia shoreline. *Id.* If the Commonwealth controlled sedimentation to even a modest degree, the Authority's report demonstrates that the intake would not be cost-justified.[4]

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[4] The Authority's study estimates the present value of solids and handling costs for the next 40 years at $7.2 million and the cost of constructing the proposed intake at $5.3 million. (App. E.) The conclusion in the

Because the Authority proposes building this mid-river intake on soil that is both owned by and within the territorial jurisdiction of the State of Maryland, Maryland law requires the Authority to seek a permit from the state. The permitting section of the Maryland Department of the Environment ("MDE") denied the Authority's permit as unnecessary because the Authority already provides water that meets and exceeds all state and federal water quality standards. (Va. App. L.)

The Authority filed an administrative appeal claiming that it is entitled to the permit under Maryland law and pursuant to various interstate compacts between Virginia and Maryland. A contested case hearing was held before an Administrative Law Judge ("ALJ") with Maryland's Office of Administrative Hearings and the ALJ will issue her opinion by June. Once the opinion is issued, the Authority and MDE will have the opportunity to file exceptions, and a Final Decisionmaker from MDE is expected to make a final decision this Fall. Either party may appeal that decision to an intermediate appellate court based upon the record developed before the ALJ. After exhausting state appeals, review of Compact issues may be had from this Court by Certiorari.

Authority's report that the project will save $1.9 million rests upon the assumption that the Authority's consumption of water from the shoreline intake will increase by a factor of three and one-third and that sediment levels will remain the same over the next 40 years. *Id.* Even a modest reduction in solids handling costs, spread out over 40 years, would eliminate the narrow margin of profitability for this project.

SUMMARY OF THE ARGUMENT

The central question presented by this case is whether riparian land owners along the Virginia side of the Potomac River who attempt to exercise property rights in Maryland are subject to Maryland's police power. Although Virginia views Maryland's preliminary decision not to authorize the Authority's proposed construction of a mid-river intake on the State of Maryland's property as "a direct challenge to Virginia's sovereignty," (Br. at 21) it is hard to conceive how this could be so. The Commonwealth has no jurisdiction in the State of Maryland, the undisputed site of the proposed intake construction.

This Court should refuse to entertain the Commonwealth's suit because its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). None of the Commonwealth's legal claims are ripe, and the Commonwealth would lack standing to bring them if they were. No Virginia riparian land owner is seeking to increase its appropriation of water from the Potomac, and only the Authority has proposed a construction project in the river. The Authority needs both a permit from MDE and a federal permit to begin construction, and neither has made a final permitting decision. Consequently, no ripe controversy now exists and it is uncertain whether one ever will.

In the event that a legal claim does become ripe, the Commonwealth is not the proper party to assert it. The rights that the Commonwealth asserts are not its own rights, but the rights of third-party riparian land owners on the Virginia side of the Potomac. The Commonwealth has not established that it has suffered or could ever suffer any direct injury as a result of the claims it makes here. The real party in interest would be the Virginia riparian land owner who has been denied a permit by Maryland.

This Court repeatedly has held that a state cannot manipulate the original jurisdiction of this Court by suing on behalf of the real party in interest. If this Court were to permit the Commonwealth to bring a *parens patriae* action, it would distort the Article III distinction between suits brought by "Citizens" and suits brought by "States." It also would circumvent the abstention doctrine that prevents the Authority from bringing a collateral federal suit after initiating litigation in Maryland, and would subject ANS' Virginia members to a class representative adverse to their interests.

I. The Commonwealth's Legal Claims Are Not Ripe.

The Commonwealth is frustrated that the Authority's legal claims have not yet been resolved in the Maryland litigation, and is seeking to litigate the Authority's claims collaterally before this Court. No case or controversy has arisen for Article III purposes, however, precisely because MDE has not decided whether or not to issue the permit. In the event that the Authority's contentions are as meritorious as the Commonwealth contends, there will be no need for the Court to exercise its jurisdiction. Nevertheless, it is important to recognize that no claim for a mid-river intake will be ripe until the Authority also obtains a permit from the Army Corps of Engineers ("ACE").

The Commonwealth also seeks to raise its legal claims by arguing that Virginia riparians are not obligated to seek Maryland's consent before increasing their appropriation of water from the Potomac. It would be frivolous for the Commonwealth to assert that these claims are ripe. The Commonwealth has failed to identify any Virginia riparian landowner who is now seeking or who intends to appropriate additional water from the Potomac in the near future.

A. No Controversy Concerning the Authority's Proposed Intake Will Be Ripe Unless ACE Issues Its Own Permit.

The Commonwealth apparently misunderstands the status of the Authority's dredge and fill permit before ACE. *See* 33 U.S.C. § 1344 (requiring an ACE permit). The Commonwealth advised the Court that "[t]he United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question." (Br. at 1.) In truth, the previously-issued permit was suspended by ACE more than two years ago. (Letter from Reardon to Sultan of 1/28/98 (App. F) ("Based on this new information, I have no recourse other than to suspend your Department of the Army permit. . . .").) ACE emphasized that "[f]ollowing this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit." *Id.*

ACE also has made it clear to ANS' counsel that the permit will not be reinstated as a matter of right if MDE ultimately issues a waterway construction permit. After ANS learned that ACE had approved the initial permit without following applicable procedure, ANS' counsel wrote to ACE requesting that the permit be revoked on numerous legal grounds. (Letter from Dubrowski to Zirschky of 12/22/97 (App. G).) ACE responded by informing ANS' counsel that the issue had been mooted because ACE already had suspended the permit. ACE then advised ANS' counsel that "[i]f the county resolves the State's concerns and obtains required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify, or revoke the Department of the Army permit." (Letter from Zirschky to Dubrowski of 3/5/98 (App. H).)[5]

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[5] In addition to the legal obligation for ACE to make a separate permitting decision now that the permit has been suspended, 33 C.F.R.

The fact that the Authority lacks the necessary authorization to construct the intake, regardless of any action taken or not taken by Maryland, demonstrates that this claim is not ripe. In *Anderson v. Green*, 513 U.S. 557 (1995), this Court dismissed a claim as not ripe under similar circumstances. In *Anderson*, this Court took jurisdiction to consider whether California's proposal to reduce Aid to Families with Dependent Children ("AFDC") payments to new residents violated the right to interstate travel. *Id.* at 559. For California to establish a payment differential for new residents receiving AFDC payments, Health and Human Services ("HHS") had to grant a waiver and such a waiver had been granted to California. *Id.* After the Court of Appeals had ruled in that case below, however, it vacated the HHS waiver in a separate proceeding. *Id.* Recognizing that no differential in payments would be made "[a]bsent favorable action by HHS on a renewed application for a waiver," this Court held that there is "no live dispute now, and whether one will arise in the future is conjectural." *Id.*

Similarly, in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), this Court rejected a challenge to a Forest Service management plan as allowing excessive logging because it was unclear whether future permits that were required for the logging to take place ultimately would be issued. The general Forest Service management plan would have allowed the logging in question, but the plan did "not itself authorize the cutting of any trees." *Id.* at 729. Because logging would require compliance with the management plan and future site-specific permitting, this Court held that legal challenges would have to be made to the site-specific permits that would

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§ 325.7(c), ACE's offer of a hearing to ANS would obligate ACE to provide a fair hearing even if the offer was made only voluntarily. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

come later – "at a time when harm is more imminent and more certain." *Id.* at 734; *see also New Hanover Township v. United States Army Corps of Eng'rs.*, 992 F.2d 470, 472-73 (3d Cir. 1993) (rejecting a challenge to a federal permit because no permit was obtained from the state).

As in *Anderson* and *Ohio Forestry*, the Commonwealth's claim against Maryland concerning the waterway construction permit is not ripe because future regulatory action is necessary for the project to take place. Until the Authority obtains the necessary permit to proceed with its project from ACE, there is no ripe claim against Maryland.

B. The Commonwealth's Request for an Advisory Opinion Concerning Water Appropriation Is Not Ripe.

Out of apparent concern that this Court would not take jurisdiction over the MDE permitting claim that already is being litigated in Maryland, the Commonwealth adds a request for this Court to rule that Maryland cannot regulate water withdrawals from the Potomac by Virginia riparians. The Commonwealth offers no evidence that any sort of controversy exists between Virginians and Maryland concerning water apportionment.

The Commonwealth rightly concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River. . . ." (Br. at 29.) Nevertheless, the Commonwealth complains that, if invoked, Maryland's permitting process for such appropriations is burdensome and time consuming. The Commonwealth has not identified any water appropriation permits that are pending and it is not clear that any will be sought in the near future. Consequently, no claim for appropriation is ripe. *See e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future").

II. The Commonwealth Lacks *Parens Patriae* Standing to Pursue The Authority's Claim for a Construction Permit.

The Commonwealth has no legally protected interest concerning the Authority's claim for a waterway construction permit, but is merely lending its name to the Authority in an effort to manipulate a forum before this Court where the Authority's claims can be heard. By its express terms, the Compact provision that the Commonwealth relies upon dealing with the "privilege" of making improvements in the river was given to the "*citizens* of each state . . . in the shores of the Patowmack river *adjoining their lands*." (Va. App. A (emphasis added).) Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit by MDE, it initiated litigation before a Maryland ALJ to obtain the permit. Plainly, it is the Authority and not the Commonwealth that is the real party in interest.

A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state can become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, § 1332. Even then, jurisdiction is limited to the lower federal courts. By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a State shall be a Party," U.S. Const., Art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue.

Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana*, 176 U.S. at 16; *compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states) *with* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland*, 451 U.S. at 737 ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil of California*, 405 U.S. 251, 258 n. 12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *State of Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-96 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana*, 176 U.S. at 16. The Commonwealth cannot circumvent this requirement by supplementing the Authority's claims with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more importantly, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits

> brought by 'Citizens' and those brought by 'States' would evaporate.

Pennsylvania, 426 U.S. at 665-66.

Having initiated litigation in Maryland, the Authority would be barred from raising these same issues in a collateral federal suit under numerous abstention doctrines, including *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315, 334-35 (1943), *Younger v. Harris*, 401 U.S. 37, 43 (1971), and their progeny. The principles of comity toward state tribunals that animate these doctrines would be circumvented if they could be avoided simply by having the Commonwealth reassert the Authority's arguments through a collateral proceeding in this Court. [6]

B. The Commonwealth Is an Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal challenges to a permit denial by Maryland. This Court cannot

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing a state to sue another state on behalf of its citizens. *See e.g., Maryland*, 451 U.S. at 745 n.21 (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil*, 405 U.S. at 259 n.12; *Cook*, 304 U.S. at 392-93.

hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

The Commonwealth's position also is antagonistic to the interests of Virginia riparians because it is responsible for the nuisance that affects their property. Equity does not allow a wrong-doer to represent its injured in shifting the responsibility for the injury to a third-party, particularly when the requested relief is incomplete. The Commonwealth should honor its own legal obligations and control nonpoint sources.

Applying *parens patriae* standing also would bind an enormous class to a litigating position that is hostile to the interests of many of its class members, including ANS' Virginia members who are customers of the Authority (App. C) and riparians on the Potomac. (App. D.); *see also supra* note 2 (listing cases finding *parens patriae* actions binding on the state's citizens). Allowing direct actions by individuals, like the one the Authority is pursuing, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

The Commonwealth does not claim standing on the basis of any direct injury to itself, and its claim of *parens patriae* standing on behalf of the people of Northern Virginia is not convincing. According to the Commonwealth, "[a]lthough it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action." (Br. at 22 n.8.) The only support the Commonwealth offers to buttress this claim are citations to two equitable apportionment cases. *Id.* (citing *Colorado v. New Mexico*,

459 U.S. 176 (1982) and *United States v. Nevada*, 412 U.S. 534 (1973)).

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment, but this is not such a case. This Court never has applied the equitable apportionment doctrine to a, river, like the Potomac, that is owned almost exclusively by one state. Moreover, the Commonwealth has assented to Maryland's jurisdiction to decide appropriation for more than 30 years, and this has become the settled course of conduct under the Compact. *See Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993) (acquiescence is binding); *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (compact displaces equitable apportionment).

In addition, there are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth cannot identify even a single Virginia riparian who has a pending appropriation request from Maryland, and the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.)

In any event, the Commonwealth cannot leverage its standing claim for equitable apportionment to obtain standing to bring the Authority's claim for a construction permit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S.Ct. 693, 706 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hearing Brief of Fairfax County Water Authority (App. I at 47a-48a).)" The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. *Id.* at 47a. The Authority also claimed that the capacity of the treatment plant would prevent it from in-

creasing its appropriation. *Id.* at 48a. ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").

Finally, the Commonwealth does not assert standing on the basis of potential harm from *Cryptosporidium* or *Giardia*, and this Court should not be concerned by the alarmist claims asserted in the Commonwealth's statement of facts. (Br. at 11.) Contrary to the Commonwealth's suggestion, there is no evidence that consumers of the Authority's water are threatened by either *Cryptosporidium* or *Giardia* and there is no evidence that moving the intake would reduce any risk that may exist.[7] 1.2 million people consume the Authority's water every day and have done so for the four years since the construction permit was requested, yet the Commonwealth has not identified a single person to have been affected by *Cryptosporidium* or *Giardia* from drinking the Authority's water. This is not surprising. The Authority operates a state-of-the-art facility that should eliminate virtually all *Cryptosporidium* and *Giardia* with a combination of filtration, chlorination and ozonation. Neither *Cryptosporidium* nor *Giardia* even have been detected in the water the Authority distributes to consumers, and the Commonwealth's brief is devoid of any

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[7] The water at the center of the river is more likely to contain *Cryptosporidium parvum*, the only species of *Cryptosporidum* known to harm humans, than waters along the shore. *C. parvum* is passed by mammalian waste, which is less likely to be in urban runoff from Sugarland and Broad Runs than waters from the middle of the river. More likely sources of *C. Parvum* do exist farther up the river, such as wastewater treatment discharge points and animal farms, and those waters are deflected from the shoreline intake by the waters from Sugarland and Broad Run. Consequently, by moving the intake to the center of the river, the Authority is more likely to withdraw water contaminated by *C. parvum*. The Commonwealth does not even suggest that there would be less *Giardia* at the center of the river.

evidence to the contrary. As the Commonwealth reminds us, "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." (Br. at 11.) The Authority itself does not appear seriously concerned as it has not issued boil alerts or even targeted warnings to persons with compromised immune systems.

If made, the Commonwealth could not demonstrate *parens patriae* standing on the basis of these claims. "Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of a serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. . . . The solution finally grasped was to saddle the party seeking relief with an unusually high standard of proof. . . ."). In addition, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or hypothetical,' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The purported threat from *Cryptosporidium* and *Giardia* comes no where close to satisfying this standard.

CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that this Court grant its motion for leave to file an *amicus curiae* brief and deny the Commonwealth leave to file a bill of complaint.

Respectfully submitted,

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